

February 22, 2004

Civil Division-Kent County (739-7641)

The Honorable William G. Glanden
Mayor of the Town of Frederica
P.O. Box 294
Frederica, DE 19946

Re: **Freedom of Information Act Complaint
Against Town of Frederica**

Dear Mayor Glanden:

Our Office received your Freedom of Information Act ("FOIA") complaint on December 22, 2004 alleging that the Town of Frederica ("the Town") violated FOIA by discussing matters of public business at a meeting on November 23, 2004 without the required advance notice to the public.¹

By letter dated December 28, 2004, we asked the Town to respond to your complaint. We received the Town's response on January 14, 2004. According to the Town, the Town Council held a public meeting on November 23, 2004 and posted the notice and agenda for the meeting on November 20, 2004. The Town contends that it satisfied the shorter notice requirements for a special meeting under FOIA (at least 24 hours in advance of the meeting, rather than the normal seven days).

The Town provided us with a copy of the agenda for the November 23, 2004 meeting which

¹ You also allege that the other members of the Council did not invite you to the meeting on November 23, 2004, but that issue is outside our jurisdiction under FOIA. FOIA only requires that notice be given to the general public, not to the individual members of a public body.

listed: Call to Order, Roll Call, Town Solicitor, and Adjournment. The Town also provided us with a copy of the minutes of the November 23, 2004 special meeting. The minutes show that four of the members of the Council were present, but that you were “Absent (Admin.Leave/Work).” The minutes also show that the Council voted (three in favor, one against) to remove William W. Pepper, Sr., Esquire as the Town Solicitor.

Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session as authorized by statute. 29 Del. C. § 10004(a).

All public bodies “shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public at least 7 days in advance thereof. The notice shall include the agenda,” Id. § 10004(e)(2).

FOIA requires a public body to give notice of any special meeting “as soon as reasonably possible, but in any event no later than 24 hours before such meeting.” Id. § 10004(e)(2). A special meeting is defined “as one to be held less than 7 days after the scheduling decision is made.” Id. The notice of a special meeting “shall include an explanation as to why the [normal 7 days notice] could not be given.” Id.

FOIA defines an “agenda” as a “general statement of the major issues expected to be discussed at a public meeting,” Id. § 10002(f).

Legal Authority

A. Notice

Our Office has interpreted the shorter notice period allowed by FOIA for a special meeting to require some showing of an “exigent circumstance or compelling need for the [public body] to hold a ‘special’ meeting to discuss a [matter] of public business.” Att’y Gen. Op. 00-IB07 (Apr. 28, 2000). For example, in Att’y Gen. Op. 01-IB02 (Jan. 30, 2001) we found that the town properly called a special meeting to consult with its solicitor because the time to appeal a court decision would have expired by the time of the town’s next regularly scheduled meeting.

See also Att’y Gen. Op. 03-IB05 (Feb. 5, 2003) (town justified in calling a special meeting to discuss the filing of a civil rights lawsuit against council members); Att’y Gen. Op. 03-IB09 (May 6, 2003) (special meeting properly called after school roof collapsed during a heavy snowfall).

FOIA requires that the notice of a special meeting “shall include an explanation as to why the [normal 7 days notice] could not be given.” 29 Del. C. § 10004(e)(2). For example, in Att’y Gen. Op. 03-IB19 (Aug. 8, 2003), the town held a special meeting to discuss road improvements, and the notice stated the town had to meet “to minimize any further delays in the work.”

FOIA “requires only a reason, not a specific detailed factual basis, why the seven-day requirement could not be met.” Att’y Gen. Op. 94-IO37 (July 26, 1994). See Att’y Gen. Op. 96-IB15 (May 10, 1996) (finding that the notice lacked “any explanation” why the seven-day requirement was not met). The notice posted for the Town’s special meeting scheduled for November 23, 2004 did not state any reason why the normal seven days’ notice could not be met. Nor is there anything in the record to suggest that there were any exigent circumstances or compelling need for the Town Council to meet on three days’ notice to discuss the Town Solicitor.

We determine that the Town violated the open meeting requirements of FOIA by failing to

post notice of a public meeting scheduled for November 23, 2004 at least seven days in advance.

B. Agenda

While FOIA “requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfied neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be treated.” Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610 (Aug. 29, 1986) (Allen, C.) (“Primary Election” listed in the agenda did not sufficiently notify the public that the county might consolidate election districts).
See Att’y Gen. Op. 92-IB20 (Aug. 30, 2002) (“Town Charter Changes” listed in the agenda “did not sufficiently alert the public that the Town would consider and vote to restrict voter eligibility”).

We do not believe that listing “Town Solicitor” in the agenda for the Town’s November 23, 2004 meeting was sufficient to inform the public that the Council would consider and vote on firing the Town’s legal counsel. We determine that the Town violated the open meeting requirements of FOIA by failing to adequately describe the matters of public business that would be discussed at the meeting on November 23, 2004.

Conclusion

For the foregoing reasons, we determine that the Town violated the open meeting requirements of FOIA by: (1) failing to post notice of a meeting scheduled for November 23, 2004 at least seven days in advance; and (2) failing to post an agenda for that meeting sufficiently alerting

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the public to the matters of public business to be discussed.

We do not direct any remediation for these violations. We have confirmed with William W. Pepper, Sr., Esquire that he continues to serve as the Town Solicitor and has not been replaced. Directing the Town to re-notice the Town Solicitor matter would not serve any purpose.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin
State Solicitor

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cc: The Honorable M. Jane Brady
Attorney General

Ms. Joan Ortiz
Secretary, Town Council of Frederica

William W. Pepper, Sr., Esquire

Phillip G. Johnson
Opinion Coordinator